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No. 172

In the Supreme Court of the United States

OCTOBER TERM, 1951

ERIC G. KAUFMAN AND ANNI C. KAUFMAN,
Petitioners

v.

SOCIETE INTERNATIONALE POUR PARTICIPATIONS INDUSTRIELLES ET COMMERCIALES S. A., etc., J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, AND REMINGTON RAND, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS J. HOWARD McGRATH, ATTORNEY GENERAL OF THE UNITED STATES, AS SUCCESSOR TO THE ALIEN PROPERTY CUSTODIAN, AND GEORGIA NEESE CLARK, TREASURER OF THE UNITED STATES, IN OPPOSITION.

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OPINIONS BELOW

The memorandum opinion of the United States District Court for the District of Columbia (R. 74) is unreported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 79) is reported at 188 F. 2d 1017.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on April 5, 1951 (R. 81). The petition for a writ of certiorari was filed on July 3, 1951. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a suit by a Swiss corporation for the return of corporate property vested under the Trading with the Enemy Act, non-enemy holders of a small block of shares in the corporation are entitled to intervene in order to assert a cause of action, to be prosecuted by the corporation for the benefit of the intervening stockholders, for the return to such stockholders of a portion of the assets equal to the proportion of shares held by them.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

Rule 24(a) of the Federal Rules of Civil Procedure (28 U.S.C., following § 723c) provides:

> (a) INTERVENTION OF RIGHT. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other

disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

STATEMENT

Societe Internationale Pour Participations Industrielles et Commerciales S. A., etc. (I. G. Chemie) brought an action in the United States District Court for the District of Columbia under Section 9(a) of the Trading with the Enemy Act (40 Stat. 419, as amended, 50 U.S.C. App. 9(a)), for the return of vested property (R. 1-15). The property involved, *inter alia*, is most of the stock of General Aniline & Film Corporation, of Delaware, which the plaintiff asserts is worth more than $100,000,000. The complaint, against the Attorney General[1] and the Treasurer of the United States, alleges, in essence, that the corporation is the owner of the property and is not an enemy within the meaning of the Trading with the Enemy Act. The answer filed by the Custodian (R. 15-30) denies that the plaintiff corporation is the owner and denies that plaintiff is not an enemy, and as a defense alleges that between 1928 and 1945 plaintiff and others engaged in a world-wide conspiracy

[1] By Executive Order No. 9788 (Oct. 15, 1946, 11 F.R. 11981), the Attorney General succeeded to the powers and duties of the Alien Property Custodian. In this brief, the term "Custodian" will be used to refer either to the Alien Property Custodian or to the Attorney General as his successor and the Treasurer of the United States (a nominal defendant).

to cloak assets of I. G. Farbenindustrie, Germany.

Petitioners, alleging that they are non-enemies and owners of 86 shares of the outstanding capital stock of I. G. Chemie, on March 9, 1950, filed suit against the Custodian in the United States District Court for the Southern District of New York under Section 9(a) of the Trading with the Enemy Act. They sought the return to them of a share of the vested assets equal to the proportion of their stockholdings in the corporation (R. 85). A motion to dismiss for failure to state a cause of action was denied on October 5, 1950, without opinion. *Kaufman* v. *McGrath*, S.D.N.Y. Civ. No. 56-246.

Shortly after filing their suit in New York, petitioners, on March 14, 1950, filed in the District Court for the District of Columbia a motion to intervene in the pending action by the corporation against the Custodian. After the court's denial of the motion on May 24, 1950 (R. 33), petitioners filed an amended motion for leave to intervene (R. 44) and an amended proposed complaint (R. 47-68). In their amended proposed complaint, brought for themselves and for all stockholders of I. G. Chemie similarly situated, petitioners allege that they are personally non-enemies and holders of 86 shares of I. G. Chemie having a current market value of about $15,000, and that the corporation is entitled to a return of the portion of the vested assets equal to the percentage of the stock in the corporation held by non-enemies, such portion to

be returned for the exclusive benefit of the non-enemy stockholders (R. 47-67). The proposed amended complaint seeks to enjoin the corporation and the Custodian from settling the principal action unless provision is first made for the payment demanded by the petitioners (R. 67).

Petitioners' amended motion for leave to intervene was denied by an order dated June 30, 1950 (R. 73-74). The Court of Appeals for the District of Columbia Circuit (Circuit Judges Edgerton, Proctor, and Fahy) affirmed the district court, holding that petitioners are not entitled to intervene under either Rule 24(a)(2) or Rule 24(a)(3) of the Federal Rules of Civil Procedure (R. 79-80).

ARGUMENT

The salient fact with respect to petitioners' case is nowhere stated in the petition. It is that petitioners, who own 86 shares[2] in plaintiff corporation, are attempting to intervene to require their corporation to prosecute a claim to a portion of the vested assets and that this claim is to be for the benefit of the intervening class of non-enemy stockholders in the plaintiff corporation, as distinguished from all of the stockholders or the corporation (R. 67).

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[2] The references in the petition to 11,000 shares are supported only by an affidavit by a Swiss citizen stating that holders of 11,000 shares have grouped together and may join in the complaint of intervention or intervene independently (R. 69, 71).

This is the essence of petitioners' cause of action. Once it is revealed, the rulings below denying intervention are seen to be plainly justified. The court of appeals held against intervention on three grounds, each ground directed to an aspect of petitioners' theory. The court of appeals held (1) that because petitioners are asserting individual and not corporate rights, they will be unaffected by any judgment given in their absence from the corporation's suit, and thus that Rule 24(a)(2) does not authorize intervention; (2) that petitioners are not entitled to intervene under Rule 24(a)(3) because as stockholders they have no direct interest in a share in the corporate assets; and (3) that intervention cannot be permitted because petitioners' individual claim may not be vicariously asserted by the corporation.

1. Since petitioners' claim to part of the assets is grounded on their individual status as non-enemies and is thus personal to them, they will not be bound or prejudiced by any judgment made in their absence from the corporation's case, and the court below so held. The judgment in the case will pass on the corporation's claim in the right of the corporation and of all its stockholders, a wholly different issue from that sought to be raised by petitioners. Petitioners seek to intervene to ward off a defeat to the corporation or a settlement of

the case by the corporation,[3] on the allegation that such a defeat or a settlement would injure their rights as non-enemy stockholders (R. 56, 58, 62, 66, 67). But total or partial defeat of the corporation in its suit to make itself whole can affect only the corporation and all of its stockholders equally. Petitioners' theory is that as non-enemy, non-tainted stockholders they are entitled, aside from, and even against, the rights of the other enemy stockholders, to a share in the corporate assets equal to the precentage of petitioners' holdings in the corporation. That alleged right, and the consequences which would flow from it, are not and cannot be in issue in the suit by the corporation, and the judgment will thus not bear on that right.

Petitioners may protect their alleged right to a share of the vested assets by bringing suit. They have done just that, in a suit for their alleged share in the corporation's assets, brought by them against the Custodian in the Southern District of New York (R. 85).[4] And their complaint in that

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[3] If the corporation prevails in its suit, petitioners' case will become moot, for to the extent that the corporation is made whole, the damage to the petitioners' alleged rights is dissipated. This, however is not the eventuality on which petitioners base their efforts to intervene.

[4] At one point (Pet., p. 10, n. 7), petitioners intimate that in their New York suit the Custodian made an argument in support of petitioners' position in this suit in the District of Columbia. The Custodian merely argued, however, that peti-

action has been upheld against the Custodian's motion to dismiss. *Kaufman* v. *McGrath*, D.C.S.D. N.Y., Civ. Action No. 56-246, Oct. 5, 1950, without opinion. We think that decision wrong but there can be no dispute that the existence of the suit in New York, and the interlocutory holding in favor of petitioners' legal right to recover, are indisputable proof that the right they allege here, if it is valid, will certainly not be affected by the ultimate outcome of the instant suit. Their remedy is saved and complete.[5]

In hard fact, petitioners have a perfect remedy in their pending suit in New York. Instead of pursuing that remedy for their alleged $15,000 interest, they are seeking here to block a settlement between the corporation and the Custodian of disputed property valued at between fifty and one hundred million dollars (R. 2, 56, 58, 66, 67). By the provisions of Section 9(a) of the Act, their New York action succeeds in tying the Custodian's hands only with respect to the minute fraction of the property which they can claim. If they were

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tioners had no direct rights at all, and that their indirect economic interests, equally with those of the other stockholders, should be settled in the District of Columbia suit brought by the corporation in the corporate right.

[5] Even if the court of appeals erred in holding that they would not be bound or concluded by a judgment in the corporation's suit, petitioners are amply protected by the very fact that such a holding was made. Right or wrong, that decision settles the issue for petitioners and respondents.

allowed to intervene in this suit, however, they could prolong almost indefinitely the litigation and the dependent question of the disposition of the assets. In seeking this position of power in the lawsuit, they run counter to the lack of congressional consent to a suit to enjoin a settlement of a pending suit against the United States and to the public policies against vexatious litigation and against efforts to prevent litigants from settling their lawsuits. *Kendall* v. *United States*, 7 Wall. 113, 116.[6]

2. The court of appeals held that petitioners, as stockholders in plaintiff corporation, do not have the direct interest in the subject matter of the main action—the corporate assets—which is required by Rule 24(a) to support an intervention.[7] This hold-

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[6] The existence of their separate suit forces petitioners into other inconsistencies. For instance, they support their right to intervene by arguing, in paraphase of the language of Federal Rule 24(a)(3), that the vested property is "before the court" in the corporation's action in the District of Columbia (Pet., p. 7). They are thus arguing that the same property is before two different courts. The property sued for by the corporation is no more "before" the District of Columbia court than is the share of the same property, sued for by petitioners, "before" the district court in New York. Moreover, and this would apply to petitioners' point even without its inconsistency, by Sections 5(a), 9(f) and 12 of the Trading with the Enemy Act, vested property is not before or in the control of the court, except that it may not be sold pending suit for its return.

[7] Petitioners argue (Pet., pp. 12, 14) that the court below was inconsistent in its two holdings that petitioners will not

ing applies the elementary principle that the stockholder can have no rights in the assets of the corporation. *Klein* v. *Board of Tax Supervisors*, 282 U.S. 19, 24; *Rhode Island Trust Co.* v. *Doughton*, 270 U.S. 69, 81; *Donnell* v. *Herring-Hall-Marvin Safe Co.*, 208 U.S. 267, 273. The principle has never had occasion to be stated in a case under the Trading with the Enemy Act, but it has been fully set out in a leading international case involving enemy property (*Standard Oil Tankers Case*, Arbitration Award, August 5, 1926, 2 *Foreign Relations of the United States*, 1926, p. 166), and its force in the domestic field of enemy property is assumed (Maurer, *Protection of Non-Enemy Interests in Enemy External Assets*, 16 Law & Contem. Prob. 407, 422 (1951)). Petitioners seek to overcome this elementary principle by relying upon *Standard Oil Co.* v. *Clark*, 163 F. 2d 917 (C.A. 2), certiorari denied, 333 U.S. 873, and by asserting that the question is important and has been anticipated but left undecided by this Court in *Clark* v. *Uebersee Finanz-Korp.*, 332 U.S. 480, 489-490 (Pet., pp. 3, 5, 6-7, 14, 17).

The *Standard Oil* case merely illustrates a careful division, between the Custodian and the non-

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be bound, with respect to their claim, by the judgment in the corporation's suit on its claim and that petitioners have no legal rights in the assets vested from the corporation. Quite the contrary. Petitioners are asserting an individual, personal—and not a corporate—right. Both holdings follow from this fact, as applied to the rules on intervention.

enemy claimant, of property (stock, patents and equitable rights in patents) which had been juxtaposed and intermingled in a complicated manner between a non-enemy and an enemy corporation associated together in business activities. The case did not involve at all the rights of a stockholder to a share of the assets vested from his corporation.

In the concluding words of its opinion in *Uebersee*, set out in the footnote,[8] this Court disclaimed its intention to decide a variety of issues. Some of the questions raised by *Uebersee* were of undoubted importance. Congress is presently considering the question of compensation for the economic losses sustained by friendly stockholders

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[8] "It is suggested, however, that this approach may produce results which are both absurd and uncertain. It is said that the entire property of a corporation would be jeopardized merely because a negligible stock interest, perhaps a single share, was directly or indirectly owned or controlled by an enemy or ally of an enemy. It is also pointed out that securities or interests other than stock might be held by an enemy or ally of an enemy and used effectively in economic warfare against this country. But what these interests are, the extent of holdings necessary to constitute an enemy taint, what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears, are left undecided. Since we assume from the allegations of the complaint that respondent is free of enemy taint and therefore is not within the definition of enemy or ally of an enemy, those problems are not now before us. We recognize their importance; but they must await legislative or judicial clarification." (332 U.S. at 489-90).

in enemy-tainted corporations where the corporation's property has been vested under the Act. S. 3901, H.R. 8998, H.R. 8422, H. Doc. 628, 81st Cong., 2nd Sess.; H.R. 133, H.R. 2263, H.R. 4284, 82nd Cong., 1st Sess. But the settled principle that such a stockholder has no direct legal interest in the corporation's assets, capable of being asserted or enforced against the Custodian, has not been left open by this Court or by Congress for judicial qualification or nullification.

Petitioners rely on the posed question (note 8, *supra*) of "what part of a friendly alien corporation's property may be retained where only a fractional enemy ownership appears." That phrase is not involved in the holding in this case. The court of appeals did not decide that all the property of a friendly alien corporation may be retained when only a fractional enemy ownership appears, or that under no circumstances may some of the property be returned. It made the different and limited ruling that the non-enemy stockholders do not have the direct interest in the corporate property, required by Federal Rule 24 (a) (3), for intervention in the corporation's suit.

3. Lastly, the court of appeals held against intervention because the corporation cannot be called upon to litigate a claim for the benefit of some of its stockholders. This Court has flatly ruled that a corporation has "no 'standing vicariously' to assert the interests of its shareholders." *Silesian-American Corp.* v. *Clark*, 332 U.S. 469, 474. The ruling in *Silesian* rests on general principles of

corporate and real-party-in-interest law and embodies as well the principle of the Trading with the Enemy Act which forbids suits by those who seek to raise the rights of others. *Farmers' Loan & Trust Co.* v. *Hicks*, 9 F. 2d 848, 850 (C.A. 2), certiorari denied, 269 U.S. 583; *Shinsaku Nagano* v. *Clark*, 85 F. Supp. 368, 374 (N.D. Ill.), reversed on other grounds, *sub nom. Shinsaku Nagano* v. *McGrath*, 187 F. 2d 753 (C.A. 7); *Kaname Fujino* v. *Clark*, 172 F. 2d 384 (C.A. 9), certiorari denied, 337 U.S. 937. Thus, petitioners cannot intervene to force their corporation to present a claim which the corporation has, itself, no standing to present.

The petition relies (Pet., pp. 10, 15) on *Missouri-Kansas Pipe Line Co.* v. *United States*, 312 U.S. 502. That case is wholly in accord with the decision here. The intervention of a stockholder—Missouri-Kansas—was allowed in corporate litigation in order that it present, derivatively, a right of the corporation. 312 U.S. at 506-8. Previously, intervention had been disallowed when the same stockholder had presented its own claim. 312 U.S. at 508; *United States* v. *Columbia Gas & Electric Corp.*, 27 F. Supp. 116 (D. Del.), appeal dismissed, *sub nom. Missouri-Kansas Pipe Line Co.* v. *United States*, 108 F. 2d 614 (C.A. 3), certiorari denied, *sub nom. Missouri-Kansas Pipe Line Co.* v. *Columbia Gas & Electric Corp.*, 309 U.S. 687.

It is improper for a corporation to assert the claim of a stockholder, or for the stockholder to intervene to require the corporation to do so. This

principle alone would bar petitioners' intervention. It is doubly improper when that claim, as here, is on behalf of some, non-enemy stockholders and is in direct conflict with the interests of the other, enemy stockholders. For petitioners' theory—that they are entitled because they are non-enemies—jettisons the enemy stockholders. The corporation may not be put in the position of having conflicts of loyalty to its various stockholders. The premise of petitioners' proposed complaint is that the corporation has the duty to present the claim of the non-enemy stockholders as against the enemy stockholders, and that on its failure to do so, the beneficiaries may intervene to act for the corporation. There being no such duty, there is no right of intervention to enforce performance of the duty.

4. Petitioners repeatedly intimate that to deny intervention by persons of their status will result in numerous actions by individual stockholders,[9] as against single actions by the corporation, with consequent interference with the administration of the Trading with the Enemy Act (Pet., pp. 7, 8, 9, 13, 16). Their concern over the administration of the Act is not shared by the Alien Property Custodian, who is charged with administration. The petitioners are the only stockholders in plaintiff cor-

[9] In their concern over the possibility of many separate suits, petitioners ignore the possibilities of joinder of such suits. In assuming that separate suits are an evil, moreover, they ignore the fact that while such suits would raise a common question of law, they would raise most uncommon issues of the degree of taint of each of the stockholding plaintiffs.

poration who have brought such a suit and the statute of limitations has run on the other stockholders. Moreover, there is at most only one other instance where both the stockholder and the corporation have brought suit.[10] There are no other instances where a stockholder has sought to intervene in his corporation's suit.

CONCLUSION

The decision below is correct; there is no conflict of decision. It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

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[10] Fritz von Opel, asserting a share interest in Uebersee Finanz-Korp., has brought suit in the Southern District of New York and in the District of Columbia. *Fritz von Opel* v. *McGrath*, S.D.N.Y. Civ. 50-70; *von Opel* v. *Clark*, D.C.D.C. Civ. Action No. 1910-49; *von Opel* v. *Clark*, D.C.D.C. Civ. Action No. 1923-49. In two other cases, the corporations involved did not file suit, and a non-enemy stockholder in each of them has sought to raise directly his alleged right to an aliquot share in the corporate assets. *Bank Waedenswil* v. *McGrath*, D.C.D.C., Civ. Action No. 1902-49; *Theising* v. *McGrath*, D.C.D.C. Civ. Action No. 1903-49.

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